United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1201

To be argued by:
James P. Shanahan

DOCKET NO. 75-1201

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-v-

FRANK S. CANNONE, STANLEY A. RAPPUCCI THOMAS A. GAETANI, JON N. ENGLISH, JOSEPH N. MARUCA, VINCENT N. CHRISTINA, ANTHONY R. SANTACROSE, JR., RAYMOND D. MASCIARELLI, JAMES W. MCGRATH, ANDREW J. QUINLAN and THOMAS A. ABBADESSA,

Appellees,

-and-
UNITED STATES OF AMERICA,

Appellant,

-v-

RAYMOND D. MASCIARELLI and LAWRENCE SCHULTZ,

Appellees.

On the appeal from the United States District Court Northern District of New York

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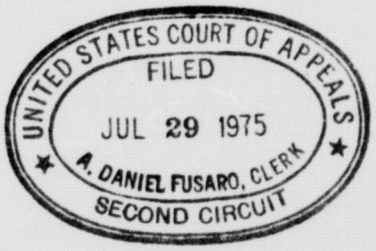
BRIEF FOR APPELLEE,
Lawrence Schultz



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STATEMENT OF THE CASE

On December 10, 1974 the named defendants in indictments 74-CR-142 and 74-CR-144 (with the exception of Lawrence Schultz - Indictment 74-CR-144) were arraigned before Hon. Edmund Port at Auburn in the Northern District of New York. Mr. Schultz, a resident of Munroe Falls, Ohio was unable to appear. He was arraigned separately on April 28, 1975 at which time I was assigned. Mr. Schultz entered a plea of not guilty and motions were returnable May 26, 1975. On May 13,1975, the return date of the United States Notice of Motion for an Order Cause as to why the subject trials should not be adjourned pending a determination by this Court of the government's appeal from Judge Port's pre-trial discovery order directing that the Assistant U.S. Attorney charged with the prosecution of the cases disclose the names and addresses of the government's witnesses intended to be called by the government and the preclusion of their testimony if not disclosed. Judge Port issued the same rulings in regard to any contemplated Schultz motions as granted to the other defendants. It is from that order and a subsequent preclusion order that the United States appeals.

The history relative to Judge Port's final determination is of little consequence. The fact remains that by Orders dated March 11, 1975 and May 1, 1975 the United States is to provide counsel in both cases with the names and addresses of all government witnesses or be precluded from having them testify. The criminal acts alleged in Indictment 74-CR-144 presumably were an intrical part of the criminal acts alleged

in Indictment 74-CR-142. One of the elements to be proven in 74-CR-144 is that defendant Raymond D. Masciarelli was engaged in the business of betting and wagering. The same proof is required in 74-Cr-142 (although over a longer period of time) if that Indictment is to stand. Therefore, although the Government may call additional witnesses in relation to the trial of the defendants charged in 74-CR-142 the same witnesses presumably would be called in 74-CR-144 to establish"the same" element in both alleged offenses.

The Government has provided Mr. Schultz with the opportunity to hear telecommunications in relation to the charge placed against him, as well as the transcripts and/or tapes of the conversation which are the subject of Indictment 74-CR-142. In any event, it is unlikely that the tapes and/or transcripts involve conversations of all witnesses that the Government purposes to call in relation to its direct proof and the issue of this refusal to honor the ruling of the District Court is now before this Court.

POINT I

THE ISSUES HEREIN ARE PROPERLY BEFORE THIS COURT.

The Government, in its effort to deny the defendant's the witness lists, initiated a procedure designed specifically to come within the literal interpretation of the comparatively recently amended 18 U.S.C.3731. This Court has not specifically ruled on this issue and the only authority cited which is directly in point is U.S. v. Battisti, 486 F.2d 961. The legisiative history of the section which, in S. Rep.91-1296 (91st Cong. 2d Sess.) p.5 specifically states that the intent of Congress was to give the Government a right to appeal discovery orders which go beyond the rules of criminal procedure. Schultz does

not challenge the right of the Government to appeal nor does he believe that the extraordinary relief of a Writ of Mandamus is in order. Schultz' position is that the Order is appealable. However, it is also defendant Schultz' position that this Court should affirm Judge Port's Orders. If this defendant concedes that the Order is appealable, (and it is the province of this Court to make that determination) then the alternative "Petition for a Writ of Mandamus" should not be considered. Such a request is an extraordinary remedy reserved for a really extraordinary cause. Ex parti Fahey 332 U.S.258,260 (1947). It may never be employed as a substitute for appeal in derogation of the policies of speedy trial, double jeopardy and the unusual need for the Government to appeal Will v. U.S.389 U.S. at 96,97. Schultz does not consider the issues here to be the basis for the consideration of the application of an extraordinary remedy nor does he consider this appeal as a dilitory tactic nor is it in any way denying defendant of any of his rights. In fact the Government was very considerate of Schultz in relation to his arraignment.

POINT II

THE DISTRICT COURT HAD THE AUTHORITY TO ORDER THE PRE-TRIAL DISCLOSURE OF THE GOVERNMENT'S WITNESSES

The Government in its brief (p.6) refers to the issues before this Court as serious questions of law and policy (emphasis added) and at p.4 states that the defense attorneys made absolutely no showing of materiality, reasonableness or necessity for such a broad pre-trial disclosure of all Government witnesses. The very request indicates materiality, reasonableness, and necessity and the Government concedes that the legal basis for such a decision is intertwined with a question of policy. The disclosure policy as developed in the Northern District of New York

was best expressed by Chief Judge James T. Foley in relation to a discovery motion in a tax case which followed a line by line challenge by this attorney of a discovery motion in U.S. v. Abramson, 66-CR-42 N.D.N.Y. Judge Foley said " give it to him".

As far back as January, 1966, Schultz Counsel, then assistant U.S. Attorney not only advised counsel for Anthony Trinca and James E. Terzini (U.S. v Trinca and Terzini, CR. No. 3313, N.D.N.Y.) of the name of a witness to be called by the Government the next day but arranged to have the witness meet with counsel prior to his taking the stand! (the case was dismissed on other grounds)

The Government concedes that this issue has not been decided in this Circuit and the gist of the Government's argument is that the specific directive for disclosure is inconsistent with 18 U.S.C. 3432, the limitations of Rule 16, Federal R. Crim. P., and that the specific limitations as to actual statements in 18 U.S.C. 3500, precludes Judge Port from acting as he did. Did this rationale prevent the Supreme Court in Brady v. Maryland 373 U.S. 83 from providing the defense with the names of witnesses which was implicit in the Supreme Court's position with regard to "evidence favorable" which obviously requires the pre-trial disclosure of witnesses?

The Seventh Circuit in U.S. v. Jackson 508 F2d, at p.1007,takes the position that Rule 16 (b) is controlled by provisions of Fed. R. Crim. P.2 which deals with fairness, simplicity and the elimination of unjustifiable expense in concluding that defense counsel does not have to show reasonableness and materiality. The reference to United States v. Percevault 490 F2d 126. 130, 131 (2d Cir. 1974) by the Government is inappropriate. There is no attempt to receive the Government's entire case. It is entirely possible that should the Government chose not to call a prospective witness the defense may wish to and such a sequence of decisions is consistent not only with the possibility of threats, but rather (and more logically) with the proper and complete development of that testimony.

As for the list of jurors requirement in 18 U.S.C. 3432, certainly these lists are provided to all counsel (and defendants) at the opening day of each term in the Northern District of New York. It cannot be inferred from that positive statement that jury panels cannot be disclosed to other defendants. The emphasis in Rule 16(b) is on internal government documents and statements made to agents by prospective government witnesses. On the face of it, Congress was referring to government agent's work product. The rule does not refer to witnesses signed statements although it presumably includes them.

The purpose of the provisions of 18 U.S.C. 3500 was not to preclude the defendant from conducting an independent investigation (including interviewing prospective witnesses) but to give the Government the benefit of its investigation which provided the basis for presenting a case to the Grand Jury.

The fact that the Government agreed to provide transcripts of intercepted telephone communications between named defendants in the cases at bar (upon appropriate authorization from the Court) and presumably others (including unindicted co-conspirators) who undoubtedly are potential witnesses is an obvious deviation from its firm position of refusing to disclose the names of witnesses. (see Government's Response to Demand Letter of Attorney Remo A. Allio App.p.23) The promulgation of proposed Rule 16(a) (1) (E) and Rule 16 (d) (1) is merely a "codification" or an official pronouncement of the position of the Supreme Court in relation to its Rules. The specific references in the proposed rules do not imply prior preclusion as much as they stand for a directive of uniformity, standardization and "codification".

The District Court did not order the Government to open it's files to the defense - that is within the prosecutor's discretion. Nor did it order a general fishing expedition. It merely ordered production of names and addresses of prospective witnesses - not their statements. The resultant

exclusion for non-compliance is within the discretion of the Court. U.S. v. Wright 489 F2d 1181 as cited in U.S. v. Nobles 43 L.W.4815 at p.4820.

POINT III

THE DISTRICT COURT JUDGE PROPERLY EXERCISED HIS DISCRETION

These cases involve thirteen defendants and half as many attorneys. Discovery procedures were followed as required and the parties differences were ruled on. The Judge had the opportunity to acquaint himself with the nature of the offenses charged; the defendants and the attorneys and the actions and reactions of the U.S. Government attorneys. The Judge decided, based on these and other factors and consistent with the Supreme Court in Langnes v. Green 282 U.S. 531,541,51 S.Ct.243,247, to grant defendants requests for disclosure of witnesses. Who are the prospective witnesses? Presumably:

Angelo A. Bontempo
Donald Garren
Eugene D. Schiappa
Carmen DeLanzo
Roger Evanek
Joyce Evanek et al

(see Indictment 74-CR-142 p.2)

That attorney Remo A. Allio states in his affidavit of April 8, 1975 that

> "....many of the so-called government witnesses have already told the defendants that they were subpoenaed to testify and/or they made statements to the federal authorities...." (Appellant's Appendix p.161)

In addition Mr. Allio represented to the Court that:

> "...any information that I have about the alleged beatings leads me to believe that there actually was not a beating, and there was only a fight between friends..." (Appellant's Appendix p.159 ¶4)

Judge Port stated on April 14, 1975 that the refusal to disclose on the part of the Government:

> "...could be an over-apprehension on the part of the prosecution, it could be a necessary or conceivably necessary precaution under the circumstances." (Appellant's Appendix p.176)

However, the Judge decided that this was not the case:

> "My usual inclination is to say to the prosecutor, "You can open up your files...."

All of the factors set forth above warrant the directive that the prosecutor provide defense counsel with the names and addresses of the prospective Government witnesses. Orderliness rather than the traditional notion of combat (the advesary system) is appropriate. The list is almost complete on the record; disclosure of addresses is time-saving, the possibility of beatings remains long after the trial is over. The possibility of a plea or pleas could result if the Government's case is revealed to the extent ordered, and cooperation (truthfulness)remains a basis for respect. A plea would make the threat factor moot.

Presumably the Government has signed and unsigned statements from all of its prospective witnesses in addition to the Grand Jury testimony and the tapes. If a prospective witness were to recant, the possible consequences are more severe than the emotional threat of terminating a friendship.

Obviously, Judge Port read the pleadings before signing the May 8, 1975 Order to Show Cause (Appellant's Appendix p.207), and reaffirmed his position. His Orders do not represent an abuse of discretion but obviously a practical decision based on the proceedings which took place to that point.

CONCLUSION

The Government's Order is appealable; A Writ of Mandamus should not be considered; the District Court as a matter of policy which has evolved over

the past thirty-four years in the Northern District of New York (this is conceded by the Government) is, after an analysis of the facts, based on sound reason in that all that remains for the Government to do is to firm up the list of the enumerated participants and a few others, (plus the addresses for the convenience of defense counsel). Proposed Rule 16 is consistent with the District Court Order and the order should be affirmed.

Respectfully submitted,

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Docket No.75-1201

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AFFIDAVIT OF

MAILING

Barbara O'Connor being duly sworn deposes and says:

That she is secretary to James P. Shanahan and on July 28, 1975, at approximately 4:30 p.m. she deposited four copies of Appellee's Brief submitted on behalf of Lawrence Schultz in a depository for United States mail in Syracuse, New York addressed to A. Daniel Fusaro and two copies addressed to Assistant U.S. Attorney Eugene Welch. One copy was mailed to each of the attorneys of record pursuant to the provisions of Rule 31(b) of the Rules of Appellate Procedure.

Dated: July 28, 1975

Barbara J. O'Connor

Barbara O'Connor

Sworn to before me this
28th day of July,1975

James B. Shanahan

NOTARY PUBLIC